

*United States Court of Appeals
for the Second Circuit*



**SUPPLEMENTAL
BRIEF**

76-1326

To be argued by
MICHAEL YOUNG

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

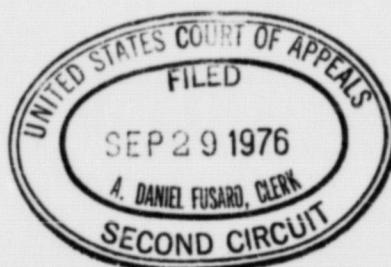
UNITED STATES OF AMERICA, :
Appellee, :
-against- :
DOCKET NO. 76-1326
JOSEPH SEILLER, :
Appellant. :

X

B
P/S

SUPPLEMENTAL BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



WILLIAM J. GALLAGHER, ESQ.
THE LEGAL AID SOCIETY,
Attorney for Appellant
JOSEPH SEILLER
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

MICHAEL YOUNG,
of Counsel.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
UNITED STATES OF AMERICA,

Appellee,

-against-

JOSEPH SEILLER,

Appellant.

-----X
Docket No. 76-1326

SUPPLEMENTAL BRIEF FOR APPELLANT

ON A APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BY BEING DENIED AN UNEDITED TRAN-
SCRIPT OF THE DISTRICT COURT
PROCEEDINGS, APPELLANT SEILLER IS
BEING DENIED HIS RIGHT TO APPEAL.

On August 26, 1976, appellant Seiller filed a motion¹ with this Court seeking an order directing the court reporters to supply appellate counsel with the corrections made by the district judge in the minutes of the re-sentencing proceeding

1 - This motion is attached hereto as Appendix A.

which is basis of the current appeal. In her affidavit in support of the application, Phylis Bamberger, Esq., co-counsel for appellant, explained that she had been advised by the court reporters for the Southern District that the transcript in question had been sent to the district judge for editing, and that only the edited transcript and not the unedited original would be supplied to appellate counsel. On September 2, 1976 this Court denied appellant's motion.² In so doing, this Court improperly infringed on appellant's right to appeal.

In the federal judicial system, "appeal is a matter of right". Hardy v. United States, 375 U.S. 2-7, 278 (1964); Coppedge v. United States, 369 U.S. 438, 441 (1960); 28 USC §§1291, 1294; Rule 37(a), Federal Rules of Criminal Procedure. It is likewise established law that an appellant is entitled to an "entire transcript" of the proceedings in the district court in order effectively to exercise his right of appeal. Hardy v. United States, supra, 375 U.S. at 379-282; see also Williams v. Oklahoma City, 404 U.S. 189 (1971); Draper v. Washington, 372 U.S. 487 (1963); Eskridge v. Washington, 357 U.S. 213 (1958). The rationale for such a requirement is obvious:

As any effective appellate advocate will attest, the most basic and fundamental tool of his profession is the complete trial transcript, through which his trained fingers may leaf and his trained eyes may roam in search of an error, a lead to an error, or even a basis upon which to urge a change in an established and hitherto accepted principle of

2 - This order is attached hereto as Appendix B.

law * * *. Anything short of a complete transcript is incompatible with effective appellate advocacy.

Hardy v. United States,
supra, 375 U.S. at 228
(concurring opinion),

The method by which that transcript is to be prepared is statutorily prescribed. The Court Reporter Act, 28 USC §753 (b) provides:

One of the reporters appointed for each... court shall attend at each session of the court...and shall record verbatim by short-hand or by mechanical means...all proceedings in criminal cases had in open court...

The reporter shall transcribe and certify all arraignments, pleas and proceedings in connection with the imposition of sentence in criminal cases... Upon the request of any party to any proceeding...the reporter shall promptly transcribe the original records of the requested parts of the proceedings and attach to the transcript his official certificate, and deliver the same to the party or judge making the request.

There is thus no authorization under this provision for the district judge to edit the transcript before it is delivered to the requesting party. To the contrary, such an edited transcript is, under this statute, not official:

The transcript in any case certified by the reporter shall be deemed prima facie a correct statement of the testimony taken and the proceedings had. No transcripts of the proceedings of the court shall be considered as official except those made from the records taken by the reporter.

28 USC §753(b)
(emphasis added)

(Rule 10 of the Federal Rules of Appellate Procedure and Part II, §30 of the Rules of the Second Circuit similarly refer to the right of appellate counsel to the "reporter's transcript.")

Under Rule 10 of the Federal Rules of Appellate Procedure, the district court has the authority to correct errors in the record, but both the wording of that rule and the cases interpreting it have found that the power of the district court to make such corrections is limited to those occasions when differences arise between the parties as to what actually occurred in the district court and the dispute is submitted for settlement to the district court.

In re Sullivan, 2 FRD 238 (SDNY, 1942); Westmoreland Asbestos Co. v Johns-Manville Corp. 1 FRD 249 (SDNY 1940).³

Regardless of the scope of the district court's power to make corrections in the reporter's transcript, however, it is imperative that the parties be advised of any such corrections so that a dissatisfied party may challenge either the substance of the change or the validity of the procedure by which it was implemented. See eg. Treasure Imports v. Henry Anders & Sons, 127 F2d 3, 4 (2d Cir. 1942).

The dangers inherent in allowing a district judge to edit a transcript of a proceeding in his court in camera

3 - Both of these cases involved the interpretation of former Rule 75 of the Federal Rules of Civil Procedure, which has since been converted into Rule 10 of the Federal Rules of Appellate Procedure "without change in substance". See Notes of Advisory Committee on Appellate Rules for Rule 10.

have been repeatedly noted by this Court. Thus, looking to the period before the adoption of the current rules limiting the district court's authority to determine the content of the record on appeal, this Court noted:

There have been cases - they are very rare, but there have been cases in the federal court - where a federal judge has refused, under his power to settle bills of exceptions, to allow things to go into the record that actually happened, much to the prejudice of the parties.

Treasure Imports v. Henry Anders & Sons, supra, 127 F2d at 4.

More recently, this Court has had occasion to note that a district judge's recollection of proceedings may be erroneous, and should therefore not be free from challenge:

We recognize, of course, that a court reporter cannot be infallible; but the same must be said of a judge's memory...

Ferguson v. United States,
513 F2d 1011, 1013 (2d Cir. 1975)

Because appellant has been denied access to the reporter's unedited transcript, it is impossible to determine whether the district judge made any material changes in that transcript. If any such changes were made, appellant is entitled to challenge those changes and to argue their significance to the issue of judicial bias raised in this appeal. Even if no material changes were made, appellant is entitled to confirm that fact for himself if for no other reason than to assure him that the judicial processes relating to his sentence and appeal are fair. cf. Hopt v Utah, 110 U.S. 579 (1884). For these reasons, this Court should order that appellant be provided with an unedited copy of the reporter's transcript of the proceedings below.

CONCLUSION

FOR THE ABOVE-STATED REASONS,
THE COURT REPORTERS SHOULD BE
ORDERED TO PROVIDE APPELLANT
WITH AN UNEDITED TRANSCRIPT
OF THE PROCEEDINGS IN THE DIS-
TRICT COURT.

Respectfully submitted.

WILLIAM J. GALLAGHER, ESQ.
THE LEGAL AID SOCIETY
FEDERAL DEFENDER SERVICES UNIT
Attorneys for Appellant
JOSEPH SEILLER
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

MICHAEL YOUNG

Of Counsel

New York, New York
September 27, 1976

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----x
UNITED STATES OF AMERICA,

Appellee,

-against-

JOSEPH SEILLER,

Appellant.

-----x
: NOTICE OF MOTION

: Docket No. 76-1326

S I R S :

PLEASE TAKE NOTICE that pursuant to the annexed affidavit of Phylis Skloot Bamberger and the prior proceedings herein, the undersigned will move this Court for an order directing the court reporters organization of the Southern District of New York to supply to appellate counsel the corrections made by the district court in the minutes of the sentence procedure that is the subject of the appeal.

Yours, etc.,

WILLIAM J. GALLAGHER, ESQ.
THE LEGAL AID SOCIETY
Attorney for Appellant
JOSEPH SEILLER
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

New York, New York
August 26, 1976

To: The Honorable A. Daniel Fusaro
Clerk
United States Court of Appeals
for the Second Circuit
1702 United States Court House
Foley Square
New York, New York 10007

The Honorable Robert B. Fiske, Jr.
United States Attorney
Southern District of New York
One St. Andrew's Plaza
Foley Square
New York, New York 10007

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----x
UNITED STATES OF AMERICA,

Appellee,

-against t-

JOSEPH SEILLER,

Appellant.

-----x
AFFIDAVIT

Docket No. 76-1326

STATE OF NEW YORK } ss.:
COUNTY OF NEW YORK }

PHYLIS SKLOOT BAMBERGER, being duly sworn deposes and
says:

I am an attorney associated with William J. Gallagher,
Esq., and in charge of the Legal Aid Society - Federal De-
fender Services Appeals Unit. I make this motion in support
of an application for an order directing the court reporters
organization for the Southern District of New York to supply
appellate counsel with the list of changes made by the district
judge in the transcript of the sentence proceedings that are
the subject of this appeal.

On December 1, 1975, this Court (United States v.
Seiller, slip op. 6509) reversed in part an order entered by
the Honorable Irving Ben Cooper which denied a motion to
vacate pleas of guilty to three counts of conspiring to trans-
port stolen securities in interstate commerce. The judgments

as to two of the counts were vacated; the sentence on the third count was vacated and the case was remanded for resentence on that count.

On June 23, 1976, the resentencing procedure was held before Judge Cooper and an appeal was filed from the new judgment. Appellate counsel was advised by the Southern District Court reporters that the minutes of that proceeding would be unavailable to counsel until the District Judge had the opportunity to correct the transcript. Counsel was also advised that the original uncorrected copy would not be given counsel.

Since the appeal in the case is concerned with the proceedings at the sentence, counsel deems it necessary to compare the original and corrected minutes to determine if substantive changes were involved.* Accordingly, appellate counsel requests a list of the changes made by the Judge in the minutes of the proceeding.

*The editing of charges to the jury by district judges prior to release of those transcripts to counsel is a matter currently under study by the Second Circuit Committee on Court Reporters.

WHEREFORE, it is respectfully prayed that an order
be entered directing the court reporters organization of the
Southern District of New York to supply to appellate counsel
the corrections made by the district court in the minutes
of the sentence procedure that is the subject of the appeal
by appellant Joseph Seiller.

Phyllis Skloot Bamberger
PHYLLIS SKLOOT BAMBERGER

Sworn to before me this
26th day of August, 1976

Inez Babb
Notary Public

INEZ BABB
NOTARY PUBLIC, STATE OF NEW YORK
No. 24-0122043
Qualified in Kings County
Commission Expires March 30, 1977

UNITED STATES COURT OF APPEALS

Second Circuit



At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the second day of September , one thousand nine hundred and seventy-six.

United States of America,
Plaintiff-Appellee,

v.

Joseph Seiller, William Silverman,
Robert Cohn, Michael Selvaggio,
Stephen Salvaggio,

Defendants,

Joseph Seiller,
Defendant-Appellant.

It is hereby ordered that the motion made herein by counsel for the

Joseph Seiller
appellant / appellee motioned responded

by notice of motion dated August 26, 1976 to direct the court reporters organization of the Southern District of New York to supply to appellate counsel the corrections made by the district court in the minute of the sentence procedure that is the subject of this appeal be and it hereby is ~~XXXXXX~~ denied

DENIED

DENIED

~~DO NOT FILE~~

HON. ELLSWORTH A. CIRCUIT JUDGES
VAN GRAAFELAND
VAN GRAAFELAND

CERTIFICATE OF SERVICE

9/27, 1976

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Southern District of New York.

✓Yef/R.Y.J